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No. 676

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19__

MERCHANT'S FAST MOTOR LINES, INC., *Petitioner*

vs.

J. R. LANE, ET AL, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Merchants Fast Motor Lines, Inc., petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 16, 1958.

OPINIONS BELOW

The district court did not render an opinion. The opinion of the Court of Appeals (R. 272) is reported in 359 F. 2d 336. The opinion is included in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1958 (R. 286). Rehearing was denied on November 21, 1958 (R. 298). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). This judgment also appears in the appendix.

QUESTION PRESENTED

Whether the court's charge which asked if petitioner's driver was negligent in any one of three respects, (1) improper lookout, (2) failure to signal, and (3) turning left when this movement was unsafe, permitted the jury to answer the question affirmatively under the third alternative by reasoning that the movement was obviously unsafe since an accident occurred, even though the jury further believed that the accident was not the fault of petitioner's driver, thus holding petitioner liable without reference to fault in violation of the controlling Texas decisions and the petitioner's rights to a fair trial under the United States and Texas Constitutions.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 68 (a) of Article 6701d, Vernon's Texas Civil Statutes reads in part as follows:

> "No person shall . . . turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with safety."

Article 1, Section 19 of the Texas Constitution reads as follows:

> "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Amendment 5 of the United States Constitution reads in part as follows:

"No person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT

This lawsuit arose out of a collision between respondents' automobile and petitioner's truck. Respondents are citizens of Texas, and petitioner is a Delaware corporation; consequently federal jurisdiction is based upon diversity of citizenship.

The accident occurred when Ward Lane, accompanied by his sister, Peggy, attempted to overtake and pass petitioner's truck which was turning left at an intersection. The jury found both drivers negligent. Peggy, being a passenger, was not prejudiced by her brother's negligence, and judgment was rendered in her favor for $30,000. (R. 259).

Petitioner's complaint is directed solely to the charge under which the jury found its driver to be negligent. This charge was in the form of a special issue, reading as follows:

"Special Issue No. 1.

"Do you find from a preponderance of the evidence that at the time of the collision in question, Louis D. McManus, the driver of defendant's truck tractor and semi-trailer, was guilty of negligence in any of the following respects:

"[a] That said McManus prior to the collision in question failed to keep a proper lookout as that term is defined, in driving along Walnut Street in the City of Colemen, Texas, or

"[b] That said McManus turned his vehicle from a direct course and moved his vehicle left

upon a roadway at a time when such movement could not be made with safety, or

"[c] That said McManus made a lefthand turn without first signaling his intention to do so?" (R. 254).

Petitioner objected to paragraph [b] on the ground that the mere fact that there was an accident demonstrated that the left turn was unsafe; hence the charge instructed the jury to hold petitioner liable for the accident without considering whether or not petitioner's driver was in any way at fault.[1] The exception

[1] The petitioner's exception to the charge is as follows:

"The defendant excepts to Special Issue Number 1 contained in the Court's charge, in that it contains the question or issue as to whether or not the truck driver was negligent when he turned his vehicle from a direct course and moved his vehicle left upon a roadway at a time when such movement could not be made with safety. This question is too general and places too big a burden upon the defendant and permits the jury to speculate as to any act or conduct which they might consider as being negligence on the part of McManus in turning his vehicle.

"For example, if I am crossing an intersection and have a green light, and another automobile coming to the intersection, that is supposed to stop at the red light, suddenly bursts into the intersection and collides with my automobile under circumstances where I am entirely innocent of any negligence, then, in that event, it must be said that I was crossing the intersection at a time when such movement could not be made with safety, and so, in that case, with McManus, the mere fact that there was an accident shows clearly that the movement could not be made with safety, and the question does not ask the jury what, if anything, McManus did that was negligent when he moved his vehicle to the left side of the roadway in making a turn from Walnut Street into San Saba Street, and since McManus was turning at an intersection, at a point where he had a right to turn, and was not required to anticipate that the driver of the automobile would violate the law and attempt to pass him in the intersection, when getting over on the north side of Walnut Street, it is permitting the jury to say that for some reason, which they imagine in their own minds, that he was negligent, merely because there was an accident, and it suggests to the jury that McManus may have been negligent because the turn could not be made with safety, even though he was entirely innocent of any negligence prior to that time, and it is, in effect, submitting the case to the jury in one question, by asking was he, McManus, guilty of negligence in having the accident." (R. 195)

was overruled, and, quite naturally, the jury answered the question affirmatively.

On appeal to the fifth circuit the majority, in affirming, held that "Paragraph b asks the jury to make a finding on the essential and specific element of *time of turning* in relation with *lookout* and *signalling*." 259 F. 2d 239. Thus, according to the majority, the jury could not answer Special Issue No. 1 "yes" by simply agreeing that alternative [b] required an affirmative answer. It had to go further and agree that petitioner's driver had kept an improper lookout or had failed to signal. The dissent insisted that the charge permitted the jury to base its answer on alternative [b] standing alone, and that alternative [b] allowed an affirmative answer simply because there was an accident, without reference to whose fault it was.

REASONS FOR GRANTING THE WRIT

1. The very simplicity of the facts here involved demonstrate the vast importance of this decision. A collision between a passing vehicle and a left-turning vehicle is an every day occurrence on the highways of America. The appellate reports abound with opinions on these facts.* And we think it is safe to assume that this situation has been involved in many, many more unappealed decisions of the trial courts. If it is true, as we contend, that the Court of Appeals has approved a charge which places liability without fault on one of the parties to this common occurrence, then the federal courts will have made a drastic change in the law of the states which they purport to enforce in diversity cases. Just how serious this is can be demonstrated by recalling the reaction that swept throughout the common-law world after *Rylands v. Fletcher*, L.R. 3 H.L. 330, declared that those engaged

*See, e.g. *Bryant v. Hall*, 238 F. 2d 783 (6th Cir. 1956); *American Fidelity & Casualty Co. v. Dresler*, 220 F. 2d 930 (5th Cir. 1955); *Werner Transp. Co. v. Zimmerman*, 201 F. 2d 687 (7th Cir. 1953); *Morris v. Crompton*, 67 So. 2d 800 (Ala. 1953); *Jones v. Pritchett*, 232 Ala. 611, 169 So. 224 (1936); *Manning v. O'Rourke*, 120 Cal. App. 432, 8 P. 2d 181 (1932); *Messina v. Audubon Ins. Co., Inc.*, 67 So. 2d 143 (La. App. 1953); *Sohio Petroleum Co. v. Fowler*, 94 So. 2d 350 (Miss. 1957); *Snoden v. Webb*, 64 So. 745 (Miss. 1953); *Guinn v. Watson*, 233 N.C. 65, 62 S.W. 2d 538 (1950); *Fisher v. Reilly*, 294 P. 2d 615 (Ore. 1956); *Mustin v. Butterworth*, 2 CCH Automobile Cases 2d 176 (Tenn. App. 1953); *Manley v. Wilson*, 313 S.W. 2d 339 (Tex. Civ. App. 1958); *Williams v. Price*, 308 S.W. 2d 185 (Tex. Civ. App. 1958); *Booker v. Baker*, 306 S.W. 2d 767 (Tex. Civ. App. 1957, error ref'd n.r.e.); *Bergeron v. Port Arthur*, 264 S.W. 2d 769 (Tex. Civ. App. 1954, error ref'd n.r.e.); *Fisher v. Leach*, 221 S.W. 2d 384 (Tex. Civ. App. 1949, error ref'd n.r.e.); *Brown Express, Inc. v. Henderson*, 142 S.W. 2d 585 (Tex. Civ. App. 1940, error dism'd); *Swartz v. Sommerfeldt*, 74 N.W. 2d 632 (Wis. 1956); *Frankland v. Peterson*, 67 N.W. 2d 865 (Wis. 1955); *Firemen's Underwriter's Dept. v. Nieman*, 56 N.W. 2d 816 (Wis. 1953); *Topham v. Casey*, 55 N.W. 2d 892 (Wis. 1952).

in ultra-hazardous activities are strictly liable.[3] Strict liability in the common intersection collision involving a left turn should be even more important, for these facts surely come up more than the facts calling for an application of *Rylands v. Fletcher*.

It is true that the instant case does not directly say that one acts as an insurer when he turns left. But by approving a charge which can be misinterpreted to call for that conclusion, it does the same thing indirectly. If it appeared that the chances of this misinterpretation were slight, the Supreme Court might be justified in overlooking the error, but the opinion itself reveals that this chance is not slight. Not only did the dissenting judge think that the charge made petitioner an insurer, *so did respondents' attorneys!* The dissent quotes from respondents' brief, revealing that respondents originally thought it was negligence per se to turn when such movement could not be made with safety. Since the accident demonstrates that the turn was in fact unsafe, then it follows that respondents first thought that petitioner was an insurer. Anyone reading the opinion can discover this, and, with this meager sample, will conclude that the charge will be misinterpreted by four out of every

[3] "When the highest tribunal of England in 1868 decided that the landowner who artifically accumulates water upon his premises is absolutely liable for damage caused by its escape, that judgment had an enormous influence throughout Anglo-American law. True, the rule evolved was supposed to possess a rational basis in the earlier common-law treatment accorded wild animals. But we are sufficiently mature to recognize that there are differences between rattlesnakes and reservoirs, and to realize that the ultimate wisdom of such a judgment must rest upon the question of how well it distributes the unavoidable losses incident to the pursuit of a particular industrial occupation." Landis, *Statutes and the Sources of Law*, HARVARD LEGAL ESSAYS, 213, 221 (1934)

six who read it. It seems reasonable to conclude that there will be a mass exodus from the state courts to the federal courts in intersection collision cases. The use of this charge may well breath a little life back into the bones of *Swift v. Tyson*, 16 Pet. 1. 10 L. Ed 865.

2. We think it is clear that the opinion is in error in saying that the charge does not allow the jury to find petitioner's driver negligent merely because there was an accident. In support of our position we offer the opinion of the dissenting judge. Second, we have the fact that respondents' three attorneys originally thought it negligence per se to make an unsafe turn. Third, we have the plain meaning of the special issue involved. If paragraph [b] does refer only to the time when petitioner's driver committed other acts of negligence, then the issue is redundant, for the time element is also included in the language that precedes the three alternatives. The issue asks: "Do you find . . . that *at the time of the collision in question*, . . . the driver . . . was guilty of negligence in any of the following respects . . ." Then follow the three alternatives which the court has labeled as *respects in which the driver could have been negligent*. The majority opinion says in effect that the label which the issue gives to the alternatives does not apply to alternative [b], and that alternative [b] merely repeats the time element which was already in the issue. We submit that this construction is utterly fantastic. Finally, we have the fact that the exacts words used in alternative [b] have elsewhere been said to embody the erroneous principle that the turning party

is negligent if he has an accident. Alternative [b] copies the language of Section 68 (a) of Article 6701d, Vernon's Texas Civil Statutes. In *Williams v. Price*, 308 S.W. 2d 185 (Tex. Civ. App. 1958), the court held that it was proper to refuse a special issue couched in the terms of section 68 (a) because:

> "We cannot conceive it to be the law that every time a started or turned automobile is struck on a public road its driver is guilty of negligence per se simply because he did not start or turn the vehicle 'with safety.' If that be the law, such a driver establishes a complete defense to his own lawsuit when he shows that he received the damages for which he sues." 308 S.W. 2d at 188.

Accord, Booker v. Baker, 306 S.W. 2d 767 (Tex. Civ. App. 1957, error ref'd n.r.e.).

The majority opinion may contain an inference that this defect is cured by the court's defining "negligence." 259 F. 2d at 339. We must remember that alternative [b] merely inquired whether or not the driver had made an unsafe turn. *The definition of "negligence" can cure the defect only if every jury will reason that a turn involving an accident is quite safe so long as it was not made negligently.* We submit that juries are not so irrational.[4] Furthermore, alternative [b] is sandwiched between two other issues, lookout and signaling, which do involve negligence per se. Since the jury does not consider whether

[4] See, e.g. *Booker v. Baker*, 306 S.W. 2d 767 at 770, 771 where the jury's verdict is summarized as follows:

> "(25) Mrs. Baker did turn to the left at a time when such movement could not be made with safety, but (26) such manner of driving was not negligence."

or not it is negligent to keep an improper lookout or to fail to signal, there is a compelling inference that it should not consider whether or not it is negligent to make an unsafe turn. For this reason the definition of "negligence" does not cure the error.

The majority cites *Bryant v. Hall*, 238 F. 2d 783, 787 (5th Cir. 1956), as using a similar charge which supports the holding in the instant case. *Bryant v. Hall* is easily distinguishable because that charge asked if the defendant *determined* that he could make a safe turn. By using the word "determine" or similar words such as "look," "see," or "ascertain," the court puts the element of proper lookout into the issue. Since this involves negligence per se, the charge is proper. However, it is evident that the element of proper lookout is not in alternative [b], because that element is already covered in alternative [a]. So far as we are aware, all of the cases which do not require the element of proper lookout to be in the charge specifically point out that a finding that an unsafe turn was made must be coupled with a finding of negligence. *Guinn v. Watson*, 233 N.C. 65, 62 S.W. 2d 538 (1950); *Williams v. Price*, 308 S.W. 2d 183 (Tex. Civ. App. 1958); *Booker v. Baker*, 306 S.W. 2d 767 (Tex. Civ. App. 1957, error ref'd n.r.e.). It is the absence of the negligence element in alternative [b] which makes the charge erroneous.

Thus we must conclude that the charge allows the jury to find against petitioner merely because there was an accident. "It is familiar law that negligence is never presumed and that the mere happening of

an accident is no evidence at all of negligence." *Wells v. Texas Pacific Coal & Oil Co.*, 140 Tex. 2, 164 S.W. 2d 660 (1942). The charge, therefore, allows the jury to render petitioner liable without considering fault. Of that the Texas Supreme Court has said:

> "If this Act [Workmen's Compensation], therefore, had declared an employer not consenting to its provisions absolutely liable in damages at the suit of an employee for any injuries sustained by the latter in the employment, without reference to any wrong or breach of duty committed by the employer, it would have been void." *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556, 559 (1916), *aff'd* 249 U.S. 151 (1918).

Of course, we are aware that liability without fault is permissible under workmen's compensation statutes, the doctrine of *respondeat superior*, and rule covering ultra-hazardous activities. However, the workmen's compensation statutes limit liability; the doctrine of *respondeat superior* requires that there be fault on the part of those controlled by the party held liable; and the rule covering ultra-hazardous activities has certain social considerations which urge its adoption. All of these justifications are absent in the instant case. Here we have unlimited liability; we require no fault on the part of either the petitioner or his employee; and we require no ultra-hazardous activity. This is liability without any justification. We submit that this is so repugnant to our traditional sense of justice and fair play as to violate petitioner's right to a fair trial under the fifth amendment to the Constitution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

REAGAN SAYERS
Counsel for Petitioner

I certify that a copy of the foregoing Petition for Writ of Certiorari for the Petitioner has been mailed on the ____ day of January, 1959 to the Respondents' attorneys as follows: Mr. H. O. Woodward, Attorney at Law, Coleman, Texas; and Messrs. Hardeman, Smith & Foy, Attorneys at Law, Post Office Box 70, San Angelo, Texas.

Reagan Sayers

APPENDIX A

IN THE
United States Court of Appeals
For the Fifth Circuit

No. 17019

MERCANT'S FAST MOTOR LINES, INC.,
Appellant,
versus
J. R. LANE, ET AL., Appellees

Appeal from the United States District Court for the Northern District of Texas

(September 16, 1958.)

Before RIVES, JONES, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This case concerns an automobile collision between a lead vehicle, making a left turn, and an overtaking vehicle. Appellant's main argument on appeal is pointed at special issues the district court submitted to the jury.

Peggy Lane was injured in a collision between her father's Pontiac passenger car and a tractor and semi-trailer truck (43 feet long) driven by McManus, an employee of Merchant's Fast Motor Lines. Ward Lane, Peggy's young brother, was driving the Pontiac at the time of the accident. J. R. Lane, as next friend of his minor daughter, Peggy, sued for her

injuries. He sued also for damages to his car and for past and future medical expenses for Peggy. On special issues, the jury found both drivers negligent. It assessed damages for Peggy in the amount of $30,000. The jury allowed Lane no damages for his automobile or for medical expenses, on the ground that Ward was on a mission for his father at the time of the accident. Merchant appealed.

I.

The collision occurred at or near the intersection of Walnut and San Saba streets in the town of Coleman, Texas at about a quarter past four in the afternoon of April 18, 1956. The Lane children frequently used the family automobile to go to and from school. Ward, then fourteen years old, had the usual driver's license. Peggy, then sixteen, had a "learner's permit" and was not allowed to drive by herself. At the time of the accident Ward was bringing Peggy and a younger brother, Richard, home from school. Peggy was in the front seat with Ward.

Both vehicles were going east, on Walnut. The Pontiac was behind the truck. Both stopped at a red light at the intersection of Walnut and Colorado streets. The next intersection is Walnut and San Saba. Just after leaving Colorado, McManus, the truck driver, saw the Pontiac in his rear view mirror. He saw the car again when he was 125 to 150 feet from San Saba. After the truck and car had gone about a third of the block, Ward swung out into the left lane intending to pass the truck. He pressed down the gas pedal. The two vehicles continued alongside. As they neared the

intersection, the Pontiac reached the front end of the trailer. At this point, without any warinng signal, the truck turned left in front of the Pontiac. That is the Lane's story. McManus says that he did signal and that the automobile sideswiped his truck. Ward veered to the left. The truck struck the car. The car out of control, crossed the intersection, jumped the curb, and hit a house. Peggy was thrown through the windshield.

The evidence is conflicting as to whether the truck driver kept a proper lookout and whether he signalled for a left turn. There is disagreement as to the point of collision. Was it in or near the intersection? There is disagreement, of course, as to whether the car sideswiped the truck, or the truck struck the car's right, rear fender. We shall not re-try the facts; that is for the jury. On the record, we cannot find any error in the jury's findings.

II.

Special Issue No. 1 in the court's charge reads as follows:

"Special Issue No. 1.

"Do you find from a preponderance of the evidence that at the time of the collision in question, Louis D. McManus, the driver of defendant's truck tractor and semi-trailer, was guilty of negligence in any of the following respects:

"[a] That said McManus prior to the collision in question failed to keep a proper lookout as that term is defined, in driving along Walnut Street in the City of Coleman, Texas, or

"[b] That said McManus turned his vehicle from a direct course and moved his vehicle left upon a roadway at a time when such movement could not be made with safety, or

"[c] That said McManus made a lefthand turn without first signalling his intention to do so?

"Answer: 'Yes' or 'No'."

Appellant objects to paragraph b. Appellant argues that the interrogatory does not inquire as to what specific act or omission of the driver was negligent; that it misleads the jury, since it suggests that the mere fact that the accident occurred leads the jury to think that there was negligence on the part of the truck driver.

The interrogatory virtually tracks the language of Section 68(a) of Article 6701(d), Vernon's Annotated Texas Civil Statutes. This reads, in part, as follows:

"No person shall . . . turn a vehicle from a direct course or move right or left upon a roadway unless and *until such movement can be made with safety* . . ."

In itself there is nothing improper in charging a jury in the language of a statute, when one of the issues in the case is whether the statute was breached. In *Swann v. Wheeler*, Tex. Com. App., 1935, 86 S.W. 2d 735, the Court said: "It appears to be the rule that when negligence is predicated upon the failure to comply with some statutory rule of conduct, or upon a violation of some penal statute, the issue of whether or not the statute has been complied with or violated

should be submitted in the language of the statute itself." Of course, the usual rules cannot be circumvented. "The law is that interrogatories must put only questions of fact from which a legal proposition must be deduced." *Carpenter v. Baltimore & Ohio Railroad Co.*, 6 Cir., 1940, 109 F. 2d 375. "If the question is a mixed question of fact and law, it may be submitted only if the jury is instructed as to the legal standards which they are to apply." *Jackson v. King*, 5 Cir., 1955, 223 F. 2d 714.

The predecessor of Section 68(a), Article 6701(d) was Article 801(k), Vernon's Annotated Penal Code, reading, in part, as follows:

> "The person in charge of any vehicle upon any public highway before turning, stopping or changing the course of such vehicle shall see first that there is sufficient space for such movement to be made in safety . . ."

Brown Express Inc. v. Henderson, Tex. Civ. App., 1940, 142 S.W. 2d 585 (error dism. judg. corr.) and *Fisher v. Leach*, Tex. Civ. App., 1949, 221 S.W. 2d 384 (error ref., N.R.E.) approved special issues couched in the language of Article 801(k).

In *Bryant v. Hall*, 5 Cir., 1956, 238 F. 2d 783, this Court approved a charge quoting a Georgia statute to the jury that is very similar to the Texas statute. In that case Bryant's dump truck was ahead of Mrs. Hall's car. As Mrs. Hall drew near the Bryant truck she began turning into the left traffic lane with the intention of passing the truck. She did not know that there was a road entrance ahead. The truck driver,

without any warning, turned left directly into the path of the car. One of the assignments of error on appeal was that the court confused the jury in its charge in quoting the Georgia statute:

> "No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in section 68-1644, to turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety . . ."

The trial court instructed the jury:

> "The effect of this law is to place the duty upon the lead vehicle to determine that the turn from the highway into a private road or driveway can be made with reasonable safety before attempting to make such a turn."

This Court upheld the instruction.

Appellant attempts to distinguish the Bryant case on the ground that there the trial judge directed the jury that the effect of the quoted statute was to place a duty upon the lead vehicle to determine whether the turn could be made. Appellant argues that since the specific element of lookout is absent from paragraph b of Special Issue No. 1, the Bryant decision is inap-

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[1] ". . . Moreover, under Georgia Code, Section 68-1647, it was also the duty of the lead vehicle to determine that the turn from the highway could be made with reasonable safety. The standard of care thus imposed upon the truck driver required his being charged with that which he could have discovered in the exercise of ordinary care, and it was for the jury to decide whether he knew *or should have known*, and realized *or should have realized* appellee's dangerous situation in sufficient time to avoid the collision."

plicable. It is argued that paragraph a refers specifically to lookout and paragraph c specifically to a warning signal; therefore, paragraph b must refer to something else, and has the effect of making the jury believe that McManus was negligent because there *was* an accident.

This argument might be more persuasive, if paragraph b stood by itself. It must be read, however, as an integral part of Issue 1 along with two integral parts, a and c. As we read it, and, as the jury read it (we think), there are three elements of negligence in a lead vehicle turning left into the path of an overtaking vehicle: (1) lack of proper lookout (paragraph a); (2) lack of a proper warning signal (paragraph c); and the necessary link between the two, (3) the factor of the time when the left turn is made (paragraph b). The driver of a lead vehicle may fail to keep a proper lookout and may fail to signal a left turn. But unless these omissions are related to the time when he is turning and a vehicle is overtaking him, it cannot be said that they are acts of negligence as to a particular following vehicle. Giving Issue No. 1, as a whole, a down to earth construction, we cannot believe that the jury was misled: Paragraph b asks the jury to make a finding on the essential and specific element of *time of turning* in relation with *lookout* and *signalling*.

What is important is that the jury be instructed on the legal standards to apply in determining issues of fact. *Jackson v. King*, 5 Cir., 1955, 223 F. 2d 714. In *Feldmann v. Connecticut Mut. Ins. Co.*, 8 Cir., 1944,

142 F. 2d 628, the Court invalidated the charge because it "made no explanation of what concept or standard the jury was required to employ in attempting to answer the question." Here, the able trial judge gave careful definitions of "negligence," "proper lookout," and "preponderance of evidence." [2] In Special Issue No. 1, the court asked the jury to examine the circumstances existing at the time the motorist must make his decision to turn. The jury must then decide whether a prudent person would have turned his vehicle *at that time.*

It seems to us that the charge attempts to make plain to the jury that the duties imposed by the statutes are conditional; the charge is designed to prevent the jury concluding that the duties imposed by the statute are absolute, the failure to observe them is negligence per se. The charge instructs the jury to avoid a conclusion that the driver of the lead vehicle must have been negligent or the accident would not have occurred. The instructions are in line with recent holdings of the Texas courts that in applying the statute the prudent driver test must be used: *Missouri Kansas-Texas Railroad Co. of Texas v. McFerrin*, Tex., 1956, 291 S.W. 2d 931; *Booker v. Baker*, Tex. Civ. App., 1957, 306 S.W. 2d 770 (writ ref'd, n.r.e.).

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[2] "'Preponderance of the evidence' means the greater weight or degree of credible evidence in the case.

"'Negligence' is a failure to exercise ordinary care, and ordinary care means such care as a person of ordinary prudence would exercise under like or similar circumstances. . . . By the term 'proper lookout' as used in this charge is meant that type and character of lookout which an ordinarily prudent person would have kept under the same or similar circumstances."

Williams v. Price, Tex. Civ. App., 1958, 308 S.W. 2d 185 (writ ref'd, n.r.e.).

We hold that the charge was not erroneous.

III.

We hold that there is no merit to appellant's contention that Peggy and Ward Lane were in a joint venture so that Ward's negligence should be imputed to Peggy.

We hold that the district court properly submitted to the jury Special Issue No. 6 permitting the jury to take into consideration future pain and suffering in fixing Peggy's damages.

The judgment is

AFFIRMED.

RIVES, Circuit Judge, dissenting:

I respectfully dissent. The form of Special Issue Number 1 quoted in the majority opinion was, I think, misleading and permitted the jury to find that McManus, defendant's driver, was negligent simply because he made a left turn "when such movement could not be made with safety." The collision of the two vehicles demonstrated that fact, i.e., the "movement could not be made with safety." The jury could easily be misled into treating that instruction as equivalent to the direction of a finding that defendant's driver was guilty of negligence. Defendant's able counsel did his best to preserve his client's rights by clearly and specifically calling to the attention of the trial

court the error in the Special Issue.[1]

Rule 49 (a), Federal Rules of Civil Procedure, permit "a special verdict in the form of a special written finding upon each issue of fact." In this case the jury answered "yes" to an issue submitted in the *alternative:* "Do you find * * * McManus guilty of negligence in *any* of the following respects: (a) * * * failure to keep a *proper* lookout * * *, *or* (b) * * * turned * * * left * * * at a time when such movement could not be made with safety, *or* (c) * * * made a lefthand turn without first signalling his intention to do so." The

[1] "The defendant excepts to Special Issue Number 1 contained in the Court's charge, in that it contains the question or issue as to whether or not the truck driver was negligent when he turned his vehicle from a direct course and moved his vehicle left upon a roadway at a time when such movement could not be made with safety. This question is to general and places too big a burden upon the defendant and permits the jury to speculate as to any act or conduct which they might consider as being negligence on the part of McManus in turning his vehicle.

"For example, if I am crossing an intersection and have a green light, and another automobile coming to the intersection, that is supposed to stop at the red light, suddenly bursts into the intersection and collides with my automobile under circumstances where I am entirely innocent of any negligence, then, in that event, it must be said that I was crossing the intersection at a time when such movement could not be made with safety, and so, in that case, with McManus, the mere fact that there was an accident shows clearly that the movement could not be made with safety, and the question does not ask the jury what, if anything, McManus did that was negligent when he moved his vehicle to the left side of the roadway in making a turn from Walnut Street into San Saba Street, and since McManus was turning at an intersection, at a point where he had a right to turn, and was not required to anticipate that the driver of the automobile would violate the law and attempt to pass him in the intersection, when getting over on the north side of Walnut Street, it is permitting he jury to say that for some reason, which they imagine in their own minds, that he was negligent, merely because there was an accident, and it suggests to the jury that McManus may have been negligent because the turn could not be made with safety, even though he was entirely innocent of any negligence prior to that time, and it is, in effect, submitting the case to the jury in one question, by asking was he, McManus, guilty of negligence in having the accident."

jury's verdict gave no indication of which alternative, (a), (b), or (c), it found to be true.

The conduct described in (a) ["failed to keep a proper lookout"] or the conduct described in (c) ["made a lefthand turn without first signalling"] was negligence per se. It seems to me that the plain meaning of (b), when read with (a) and (c) and the remainder of the instruction, is to define conduct which in and of itself constitutes negligence. My brothers say not. They say that: "Giving Issue No. 1, as a whole, a down to earth construction, we cannot believe that the jury was misled. Paragraph b asks the jury to make a finding on the essential and specific element of *time* of turning." I do not agree. With deference, that construction of (b) seems to me an artful and finespun one which might occur to a skillful legal mind, but not the plain and ordinary meaning of the words as a jury of laymen would understand them.

Indeed, the original brief filed on behalf of plaintiffs-appellees undertook to justify (b) as describing negligence per se.

> "Section 68 (a) of Art. 6701 (d) has been held by Texas Courts of Civil Appeals to impose a specific duty upon motorists, not to turn unless the movement can be made with safety. *Bergeron v. City of Port Arthur*, 264 S.W. 2d 769 (Tex. Civ. App. 1954; error ref. N.R.E.), was a case in which the jury found that plaintiff turned when such movement could not be made with safety. The court held that such finding established negligence per se."

The contention that a violation of the statute consti-

tuted negligence per se was elaborated in appellees' supplemental brief filed May 5, 1958.

However, in a later supplemental brief filed May 9, 1958, counsel for appellees, with commendable candor, calld to our attention the very recent cases of *Williams v. Price*, 308 S.W. 2d 185, and *Booker v. Baker*, 306 S.W. 2d 767, and conceded that those cases establish "that, at least where the facts raise an issue of excuse for the statutory violation, the jury must also find that the defendant (or other party turning left) was negligent in that respect. * * * In view of these decisions our previous statements to the effect that a violation of Sec. 68(a) is negligence *per se* are probably too broad. The submission to the jury must include the element of negligence, a standard based upon the conduct of the 'ordinary, prudent man.'"

When plaintiffs-appellees' counsel themselves thus frankly concede that they misunderstood the effect of the statute, how can we justify a holding that the special issue tracking the language of the statute, without further explanation, did not mislead the jury?

My brothers cite Texas decisions authorizing the submission of issues in the language of the statute itself. Those cases are not helpful in the independent federal system of administering justice, an essential characteristic of which "is the manner in which, in civil commonlaw actions, it distributes trial function between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *Byrd v. Blue Ridge Cooperative*, 1958, 356

U.S. 525, 537. Here we are governed by Rule 49 (a), Federal Rules of Civil Procedure, and by the recent sound construction of that rule by this Court:

> "This charge was clearly inadequate. Rule 49 (a), Federal Rules of Civil Procedure, permits submission of special interrogatories to juries only of issues of fact. If the question is a mixed question of fact and law, it may be submitted only if the jury is instructed as to the legal standards which they are to apply."

Jackson v. King, 1955, 223 F. 2d 714, 718. See also, *Scarborough v. Atlantic Coast Line R. Co.*, 4th Cir. 1951, 190 F. 2d 935; *Feldmann v. Connecticut Mut. Life Ins. Co.*, 8th Cir. 1944, 142 F. 2d 628; *Carpenter v. Baltimore & O. R. Co.*, 6th Cir. 1940, 109 F. 2d 375.

The general definition of negligence by the district court (see footnote 2, majority opinion) did not remove the misleading defect from the special issue. The jury would probably still believe that the conduct described in (b) constituted negligence per se.

Convinced that Special Issue Number 1 was so misleading as to deprive the defendant-appellant of a fair trial, I respectfully dissent.

JUDGMENT

Extract from the Minutes of September 16, 1958.

MERCHANT'S FAST MOTOR LINES, INC.,

No. 17019

versus

J. R. LANE, ET AL,

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Merchant's Fast Motor Lines, Inc., and the surety on the supersedeas bond herein, United States Fidelity & Guaranty Co., be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"RIVES, Circuit Judge, Dissenting."